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IN THE

SUPREME COURT OF THE UNITED STATES

No. 753 OCTOBER TERM, 1936

AETNA INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 754 OCTOBER TERM, 1936

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 755 OCTOBER TERM, 1936

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

Respondent's Brief Contra Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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SUPPLEMENT TO PETITIONERS' STATEMENT OF THE CASE

In addition to the provisions of the policies recited in petitioners' Statement of the Case (Petitioners' Brief, pp. 3, 4), each policy also contained the following union mortgagee clause:

> "Loss or damage, if any, under this Policy, shall be payable to John M. Kennedy, 3rd, as mortgagee, (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property * * * "

(Plaintiff's Exhibit 1, Rec. p. 60; Plaintiff's Exhibit 2, Rec. p. 74; Plaintiff's Exhibit 3, Rec. p. 85).

SUMMARY OF ARGUMENT

The only issue in the case was whether Kennedy and the insurance companies had mutually rescinded Kennedy's separate contracts of insurance. The evidence, which contains no factual contradictions, conclusively resolves that issue in the negative. Since that issue is legal, not factual, the order of the Circuit Court neither re-examined a fact tried by the jury, nor deprived petitioners of their right of trial by jury. In any event, both parties waived their right to trial by jury by requesting peremptory instructions and other instructions dealing exclusively with the said legal issue.

ARGUMENT

The effect of the union mortgagee clauses recited above was the creation of a contract of insurance between the insurance companies and the mortgagee, entirely separate and distinct from the contract between the insurance companies and the assured. *Queen Ins. Co. v. Peoples Union Savings Bank* (C. C. A. 3d) 50 F. (2d) 63.

Under the terms of the policies, the insurance companies could have cancelled Kennedy's interest in the policies on ten days notice. Concededly, no notice of any kind was given, and therefore it may not be said that there was any cancellation of Kennedy's interest by the method provided for in the policies. Nor may it be said that the cancellation by the bank of its interest in the policies resulted in the cancellation of Kennedy's interest. Kennedy's interest arose out of a separate contract of insurance created by the union mortgagee clause and this interest could not be diminished or destroyed by any agreement between the insurance companies and the bank.

As above noted the policies specifically provide (Plaintiff's Ex. No. 1, Rec., p. 60; Plaintiff's Ex. No. 2, Rec., p. 74; Plaintiff's Ex. No. 3, Rec., p. 85) that

> "The interest of the mortgagee • • • shall not be invalidated by any act • • • of the mortgagor or owner • • • ."

Certainly the cancellation by the bank of its interest in the policies was an act within the scope and purpose of the clause quoted.

In *3 Joyce on Insurance*, para. 1668, it is said that

> "Notice to the mortgagee is a prerequisite to cancellation under a standard policy containing a mortgagee clause and providing that it may be cancelled at any time at assured's request where it is also provided that

no act or default of any person other than the mortgagee or his agent shall affect his right to recover in case of loss."

and that

"Notice to one of several holding an interest under the policy is insufficient."

The only other method, therefore, whereby Kennedy's separate contracts of insurance could have been rescinded, was by mutual agreement between Kennedy and the insurance companies. This requires, however, Kennedy's consent and as in every other agreement, the consent must be mutual, i. e., there must be a meeting of the minds.

The conduct and language upon which defendants rely to establish Kennedy's consent is contained in the testimony of Nochem S. Winnett, Esq., the attorney for the bank, who was called as a witness by the defendants. The relevant portions of his testimony are contained in full in the Opinion of the Circuit Court, at Record pages 223 to 226 inclusive, and are therefore not repeated here.

It is respectfully submitted that that testimony does not establish Kennedy's consent.

Reading it in a light most favorable to defendants, it shows that Kennedy was advised of the intention of the bank to surrender the policies at some indeterminate future date; that Kennedy knew or should have known, if they did so that his separate contracts of insurance might be cancelled by the companies on ten days' notice and that thereafter perhaps he intended to be without insurance. Until the lapse of the ten days, however, his policy was in full force and effect. In this connection it is important to note that Winnett, the agent of the bank, to whom Kennedy is supposed to have expressed his consent, did not know (and Kennedy also did not know), after the fire whether the policies had been cancelled; and yet defendants contend that it was to Winnet that Kennedy expressed his consent to the cancellation (Rec., p. 153). Certainly, defendants failed to establish an expressed consent and, as a matter of fact,

the defendants' witness Winnett, admitted that Kennedy did not acquiesce in or authorize the cancellation of the policies (Rec. p. 151).

In 12 C. J. 518, "Consent" is defined as follows:

> "Consent, in law, is not a vacant or neutral attitude, and implies something more than a mere acquiescence in a state of things already in existence, or a mere formal act of the mind; it is affirmative in its nature, implying some positive action * * *."

The burden of proving such "consent" rests, of course, on the defendants who raised the defense of cancellation.

As stated in 26 C. J. 515:

> "Where defendant alleges that the contract or policy had been cancelled, the burden is on it of proving cancellation, and incidentally of proving its compliance with conditions precedent to the right to cancel."

See also *3 Joyce on Insurance*, 2848, and cases cited.

Respondent maintains, therefore, that not only did defendants fail to meet this burden but that the evidence clearly establishes that plaintiff did not consent.

Respondent further contends that even if it be assumed (although it is in fact denied) that Kennedy consented to the cancellation of the policies, the consent, not being communicated to the defendants, could not result in a mutual agreement of rescission. There is not a word of testimony in the record to show that the alleged consent of Kennedy was communicated to the defendants, or that they had any knowledge whatever of the conversation between Winnet and Kennedy relied on by defendants to establish Kennedy's consent. Likewise and conversely there is no evidence whatsoever to show that defendants notified Kennedy of the transaction wherein they accepted the policies from the second mortgagee and returned the unearned premiums.

Inasmuch as there was no communication between defendants and Kennedy, there could not be that meeting of the minds requisite for mutual rescission.

As stated in *3 Joyce on Insurance*, sec. 1634, pp. 2765-66:

"It is necessary in cases of rescission or cancellation by agreement that there be a complete contract or meeting of minds, otherwise the agreement will not stand."

And in *Waters v. Annuity Co.*, 144 N. C. 663, 672:

"A contract of insurance may be set aside by mutual consent, the consent of one of the parties being respectfully the consideration for the consent of the other. But where, as here, this is the sole consideration claimed, in order to make a binding agreement there is required the essential element in the law of this and all other contracts—that of mutuality."

In *Sea Ins. Co. vs. Johnston*, 105 Fed. 286, 291, it is said:

"Such, unquestionably, is the effect of the acceptance by the insured of the proposition of rescission if the acceptance is unqualified. The minds of the contracting parties must meet in this case as in that of other contracts."

And in 13 C. J. 601:

"If one party to a contract furnishes a legal ground for rescission, his assent to a rescission declared by the other is unnecessary, but in the absence of such ground all the parties to the contract must assent to its rescission and there must be a meeting of their minds. Hence one party to a contract cannot rescind it by merely giving notice to the other of its intention to do so; the offer on the one side must be accepted on the other, such offer and acceptance being governed by the same rules as govern the inception of contracts generally, as, for example, when the offer is made by mail."

See also, *Thompson v. Stone*, 43 Pa. Sup. 69.

As stated above, there is no evidence whatever to show that the alleged consent of Kennedy to the cancellation of the policies was ever communicated to the defendants, or that they, in turn, notified him of their acceptance of the policies from the second mortgagee, and the subsequent return of the unearned premiums. On the other hand, all the evidence shows that the insurance companies mistakenly believed that Kennedy, despite the mortgagee clause, had no

interest in the policies; that it was therefore unnecessary to obtain his consent to, or give him notice of, cancellation of the policies; and that they therefore dealt solely with the bank, to the entire exclusion of Kennedy, in their negotiations with respect to cancellation of the policies. Under these facts, we respectfully submit that the interest of the mortgagee in the said policies was not cancelled but remained in full force and effect.

It is therefore apparent that the only issue was whether Kennedy and the insurance companies had mutually rescinded Kennedy's separate contracts of insurance. That this is the only issue is not denied by petitioners who in their brief at page 16 say:

> "The sole issue, we repeat, was whether the respondent had consented to cancellation, and this factual issue was fairly presented to the jury who found in your petitioners' favor."

Respondent submits, however, that the issue is legal, not factual; and that the answer thereto is a conclusion of law to be determined by the Court from several undisputed evidentiary and operative facts.

In *Baltimore & Carolina Line, Inc., v. Redman*, 295 U. S. 654 (1935), this Court, in discussing the Seventh Amendment to the Constitution said:

> "The aim of the amendment • • • is to preserve the substance of the common law right of trial by jury • • • whereby • • • issues of law are to be resolved by the Court, and issues of fact are to be determined by the jury."

Since there was in the instant case no issue of fact to be determined by the jury, but only an issue of law to be resolved by the Court, it follows that the Seventh Amendment has not been violated, and that the Circuit Court has neither re-examined a fact tried by the jury, nor deprived petitioners of their right of trial by jury.

In any event, as pointed out by the Circuit Court, both parties admitted that there were no factual contradictions

in the evidence by requesting peremptory instructions (Rec., p. 228).

Petitioners contend, however, since both parties submitted other points for charge, that the case comes within the scope of the exception to the rule enunciated in *Bank of Union v. Fidelity & Casualty Co., of N. Y.* (C. C. A. 8th) 62 F. (2d), 1040, 1041, as follows:

> "Ordinarily, where both parties move for a directed verdict with reservations, it amounts to a waiver of a jury trial, and a submission to the court of questions of fact as well as of law. Beutell v. Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654; Williams v. Vreeland, 250 U. S. 295, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. But, where a party makes such motion, and at the same time requests instructions to the jury which show he does not intend to waive his right to jury trial if his motion is overruled, he cannot be held to have waived a trial by jury of the *fact questions.*" (Italics ours.)

Respondent submits, however, first, that there were no "*fact questions*"; secondly, that since there were none, mere requests for instructions could not create them; and thirdly and finally, that the instructions requested by both parties dealt with the single legal question of whether the policies were in force as to Kennedy at the time of the fire (Rec. pp. 172-178).

In conclusion, respondent respectfully submits that the evidence will sustain a judgment only for plaintiff in the agreed sum of $11,000.00, and that the ends of justice will be best served by permitting that judgment to stand and not by retrying a cause in which the facts are undisputed, and whose inevitable result, if retried, would be a similar judgment for plaintiff.

Respectfully submitted,

HARRY SHAPIRO,
Attorney for Respondent.